EXHIBIT C21-4

FCC WC Docket No. 02-359
Cavalier Telephone, LLC's Reply Brief
November 3, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

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CAVALIER TELEPHONE, LLC. Plaintiff	)	
	)	
versus	)	Civil Action No. 03:01CV736
	)	
VERIZON VIRGINIA INC., Defendant	)	

<u>REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION</u>

Plaintiff, Cavalier Telephone, LLC ("Cavalier"), respectfully submits this Reply Memorandum in support of its Motion for Temporary Restraining Order and Preliminary Injunction, in response to the November 14, 2001 Opposition to Motion for Temporary Restraining Order ("Opp.") filed by defendant, Verizon Virginia Inc. ("Verizon").

In its Opposition, Verizon tries to tar Cavalier with the brush of inequity by claiming that Cavalier wants "service for free" (Opp. at p. 2). However, Verizon ignores essential facts. As shown below, Cavalier at first paid its best estimate of what it owed Verizon, but Verizon refused to confirm or deny the accuracy of the payments, and refused to agree to a final settlement of past due amounts. Cavalier has long sought some resolution of these issues, even after Verizon sent Cavalier the October 15, 2001 letter that triggered the pending motion. However, Verizon has not even responded to Cavalier's most recent offer, relying instead on unilateral tactics that violate the interconnection agreement between the parties. Verizon should not be permitted to prevail based on these facts, nor on its flawed legal arguments, as explained below.

Factual Background

Verizon admits that Cavalier has long disputed the accuracy of "loop bills" that Verizon sends to Cavalier. (Declaration of Catherine T. Webster, Exhibit "1" to Opp., at ¶ 2.) In fact, as already stated in support of Cavalier's motion, Cavalier has disputed bills for time periods dating back to July 1999 (Whitt Affidavit[1] at ¶¶ 8-9, 18). Verizon steadfastly ignores the fact that the U.S. Department of Justice, several other competitors like Cavalier, and Verizon's own employees have all sharply criticized the very billing processes that Cavalier has disputed (see Exhibits "2" through "8" to Clift Affidavit).

Verizon instead focuses on the allegation that Cavalier has not paid its bills since July 2000 (see, e.g., Opp. at pp. 1, 4). However, Verizon neglects to mention that Cavalier "self-billed" for the time period from July 1999 through July 2000, paying Verizon the amounts that it thought were due to Verizon, and that Verizon refused to confirm or deny these amounts were satisfactory (Whitt Affidavit at ¶¶ 18-25).

Verizon also distorts the nature of settlement negotiations between the two parties, describing Cavalier's actions as "flat refusal to offer any sort of productive solution." (Declaration of Catherine T. Webster, Exhibit "1" to Opp., at ¶ 6.) The facts show the opposite. Late in the first quarter of 2001, after Cavalier was forced to abandon "self-billing" (Whitt Affidavit at ¶ 26), Cavalier tried to close out the books through December 31, 2000 (id. at ¶ 28). However, Verizon would not agree to a final settlement, claiming that a settlement with Cavalier might complicate efforts to repair what Verizon admitted was an industry-wide problem (id. at ¶ 28).

[1] The November 13, 2001 Affidavits of Brad A. Evans, David O. Whitt, and Martin W. Clift, Jr. are cited throughout as Evans Affidavit, Whitt Affidavit, and Clift Affidavit, respectively.

Verizon further errs when it proclaims that "the only 'emergency' here is one of Cavalier's own making" (Opp. at p. 2). Despite Verizon's initial refusal to resolve the billing dispute, Cavalier continued its efforts to resolve this dispute with Verizon, meeting with Verizon in June, July, and August (Whitt Affidavit at ¶¶ 30-35). Verizon promised to produce a corrected set of bills by the end of October 2001 (id. at ¶ 36), but instead sent Cavalier the October 15, 2001 letter that triggered Cavalier's request for a temporary restraining order in this action (id. at ¶¶ 37-40).

Even when Verizon resorted to these coercive tactics, Cavalier's first response was not to rush to court, but to dispatch its President, Vice President-Finance, and Vice President-Regulatory to meet with senior Verizon executives in Boston (id. at ¶ 41; Clift Affidavit at ¶ 37). In that meeting, Cavalier once more sought to resolve its billing disputes with Verizon in good faith, and offered a specific amount to settle all disputed bills from Verizon to Cavalier, as well as all disputed bills from Cavalier to Verizon (Whitt Affidavit at ¶ 42). About three weeks later, faced with Verizon's arbitrary deadline, Cavalier sought relief in this court. The "emergency" described by Verizon was thus a product of Verizon's prior refusal to effect a final settlement of past amounts, and its failure even to respond to Cavalier's most recent settlement offer.

Further, while Verizon decries a purported effort to obtain "free service," the record shows not Cavalier's refusal to pay, but instead underscores Cavalier's many efforts to resolve a long-running billing dispute. Cavalier does not want free service, but instead has worked hard to find a way to pay Verizon (Evans Affidavit at ¶ 29). A simple reason motivates Cavalier—the company must "stop wasting internal resources dealing with monthly billing hassles and...obtain some clarity in its bills, for purposes of dealing with its investors and lenders" (Whitt Affidavit at ¶ 40).

Finally, Verizon claims that Cavalier claims deficiencies in Verizon's "services" for the first time in its October 30, 2001 response to Verizon's October 15, 2001 letter (Declaration of Catherine T. Webster, Exhibit "1" to Opp. at ¶ 12.). However, it is a matter of public record that Cavalier sought monetary damages and injunctive relief from the State Corporation Commission ("SCC") in Case No. PUC990191,[2] commenced on October 18, 1999 exactly because of such deficiencies. Cavalier later withdrew the complaint after the SCC declined to penalize Verizon in another proceeding (see November 1, 2001 Complaint at ¶¶ 161-163).

Despite Verizon's many efforts to depict Cavalier as the culprit in this matter, one simple fact has forced Cavalier to seek a temporary restraining order from this Court: the parties should sit down and resolve the billing dispute as to past amounts due, and work out a reasonable arrangement going forward. Unfortunately, as with so many other aspects of the parties' relationship, Verizon refuses to pursue such a simple, reasonable procedure.

Applicable Standards

Cavalier and Verizon do not differ on the applicable case law governing the issuance of a temporary restraining order and preliminary injunction in the Fourth Circuit: Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977) and its progeny govern the Court's analysis.

2 See http://www.state.va.us/scc/caseinfo/puc/c990191.htm. In a June 15, 2000 Order (available at http://www.state.va.us/caseinfo/puc/case/c990191b.pdf), the SCC found that it lacked jurisdiction to award monetary compensation for such deficiencies. This disclaimer of jurisdiction distinguishes this action from

Likelihood of Success on the Merits

Verizon opposes Cavalier's motion on several legal grounds, claiming that Cavalier's motion is unrelated to its Complaint in this action, that Cavalier itself created any "emergency," and that Verizon is entitled to impose an "embargo" on new loops or terminate the interconnection agreement between the parties. Verizon errs on all points.

First, Cavalier's complaint includes a claim for breach of the interconnection agreement (Complaint at ¶¶ 270-276) and for violation of the BA/GTE Merger Order (id. at ¶¶ 219-228), the same legal bases as are advanced in support of this motion. Both claims specifically include requests for injunctive relief (id. at ¶¶ 228, 276). The Complaint also addresses Verizon's billing problems (id. at ¶¶ 137-143), and specifically the bills for loops, or unbundled network elements (id. at ¶¶138-140).

Second, it is Verizon, not Cavalier, who created this situation. From July 1999 through July 2000, Cavalier sought to "self-bill" rather than ignore Verizon's erroneous bills, but Verizon would not confirm or deny the adequacy of this method (Whitt Affidavit at ¶¶ 18-25). Cavalier also sought to close out the books through December 31, 2000, but Verizon would not agree to a final settlement (id. at ¶ 28), instead insisting on maintaining a dispute of indefinite duration. Likewise, on October 22, 2001, Cavalier proposed a settlement of all disputed bills from Cavalier to Verizon and from Verizon to Cavalier (id. at ¶¶ 41-42), but Verizon has not yet responded. Faced with Verizon's arbitrary deadline, Cavalier was forced to seek relief.

Third, Verizon's argument on the merits is flawed. Verizon did not oppose Cavalier's claims about Verizon's violations of the Federal Communications

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the cases cited by Verizon in support of its statement that Cavalier's claims "may...be within the exclusive jurisdiction" of the SCC. See Opp. at p. 9, n. 7.

Commission's BA/GTE Merger Order,[3] and has therefore waived any defense to Cavalier's argument against Verizon's conduct on those grounds. Further, as described below, Verizon would violate specific provisions of its interconnection agreement with Cavalier if it acts upon its stated intentions.

Although Verizon argues that its interconnection agreement with Cavalier allows it to take the actions threatened in its October 15, 2001 letter (Opp. at pp. 9-11), Verizon neglects or misconstrues several crucial provisions of that agreement. First, the agreement specifically provides for a dispute resolution process when bills are disputed (Exhibit "1" to Clift Affidavit at § 21.add cite). Verizon instead seeks to impose its own resolution of a dispute, by claiming that "Verizon's demand letter concerns amounts as to which Cavalier can have no good faith dispute" (Opp. at p. 5, n. 4.). It is not Verizon's prerogative to decide whether Cavalier may dispute a bill, and even with the $9 million "minimum" amount sought by Verizon, Cavalier immediately identified a $1.5 million error (Whitt Affidavit at ¶ 39). As Verizon has conceded, that amount is a "theoretical minimum amount" (Opp. at p. 11), and Cavalier disagreed with it and proposed an alternative to Verizon (Whitt Affidavit at ¶ 42). Verizon has not yet responded. Cavalier does not maintain "that it owes nothing for...service" (Opp. at p. 11); but Verizon cannot forever refuse to effect any final resolution of what <u>is</u> owed.

The interconnection agreement also specifies what interest charges apply if a purchasing party "withholds payment on the bill (in full or in part) and initiates a biling dispute...." (Exhibit "1" to Clift Affidavit at § 21.3.3, p. A-17), and states that "[c]losure

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[3] The June 16, 2000 Memorandum Opinion and Order, FCC 00-221, in *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC Docket No. 98-184 is cited as "the BA/GTE Merger Order."

of a specific billing period shall occur by joint agreement of the Parties," (id. at Attachment VIII, section 3.1.8.3, p. VIII-25). The agreement thus specifically contemplates the action that Cavalier was regrettably forced to take, and specifically disallows a unilateral "closure" like that insisted upon by Verizon.

In sum, the interconnection agreement does not support Verizon's threatened actions in the present factual context. Cavalier has therefore refuted Verizon's claims in this respect, or at the very least raised a substantial question going to the merits of its claims. However, Cavalier agrees with Verizon that an undisputed amount should be defined and paid, and that any further disputed amounts should also be defined an paid, to put an end to a dispute that will soon be entering its fourth fiscal year for Cavalier.

The balance of harm weighs in favor of granting the injunction.

Verizon has turned on its head the accepted analysis of irreparable harm in injunction cases. On the one hand, Verizon argues that driving Cavalier out of business and throwing telephone service into turmoil for over 100,000 Virginia telephone users does not constitute irreparable harm because, in the end, it is all compensable in monetary damages. In a case cited without explanation by Verizon (Opp. at p. 13), the Fourth Circuit has explained why this contention is not persuasive:

> Even if a loss can be compensated by money damages at judgment, however, extraordinary circumstances may give rise to the irreparable harm required for a preliminary injunction. For example, the Seventh Circuit has noted that even where a harm could be remedied by money damages at judgment, irreparable harm may still exist where the moving party's business cannot survive absent a preliminary injunction or where "damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected." These situations are quite narrow, reflecting instances where the harm suffered by the plaintiff from denying the injunction is especially high in comparison to the harm suffered from granting it.

Hughes Network Systems, Inc. v. Interdigital Communications Corp., 17 F.3d 691, 694 (4th Cir. 1994) (citations omitted); see also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546 (4th Cir. 1994) (irreparable harm from interruption of service and loss of customers' goodwill); Federal Leasing, Inc. v. Suburban Trust Co., 650 F.2d 495 (4th Cir. 1981) (irreparable harm from company's inability to continue business and preserve existence, as well as to its relations with customers and investors).

Further, Verizon has not addressed the impact of its threatened actions on Virginia consumers. If Verizon carries out its threats, those customers will likely suffer from disrupted or terminated service, and ultimately return to Verizon (Evans Affidavit at ¶ 36). These effects indicate that the public interest weighs strongly in favor of granting the injunction, as discussed below, but they also constitute irreparable harm to Cavalier. See GTECH Corp. v. Charles Town Races, Inc., 1997 U.S. Dist. LEXIS 12828 (N.D.W.Va. May 23, 1997) (possibility of permanent loss of customers to a competitor constitutes irreparable harm).

On the other hand, Verizon is forced to rely on sheer invention and fantasy to bolster its argument that Verizon will suffer irreparable harm if an injunction is granted. Verizon claims that Cavalier has raised the specter of its own insolvency, thus endangering Verizon's ability to be paid (Opp. at p.15), as described in Hughes Network Systems, *supra*. However, Cavalier never said anything of the sort. Verizon's citation to page 5 of Cavalier's November 13, 2001 Memorandum merely points to Cavalier's argument that Cavalier will suffer irreparable harm if an injunction is not granted.

In fact, the only harm that will flow to Verizon is a relatively slight increase in a liability that Verizon has delayed resolving since July 1999. It is this type of harm, not the devastating and irreparable harm that would flow to Cavalier, that is readily compensable in monetary damages. To protect against this very ordinary Cavalier therefore proposes to post a sufficient bond, as described below.

Finally, citing National Communications Association, Inc. v. AT&T Co., 2001 U.S.Dist. LEXIS 951 (S.D.N.Y. Feb. 6, 2001) ("NCA"), Verizon argues that Cavalier cannot claim irreparable harm because Cavalier's actions amounted to "self-help" and failed to mitigate its damages. As noted above, Cavalier relied upon its contractual right to dispute Verizon's charges, when Verizon continued to bill improperly and refused to settle past due amounts. Such conduct is not self-help but merely the exercise of contractual rights. Cavalier did not even exercise those rights until after having "self-billed" and paid its best estimate of what it owed Verizon for some time. Moreover, Cavalier's repeated efforts to resolve the billing dispute with Verizon show that Cavalier actively sought to mitigate any damages flowing from the billing dispute.[4]

NCA is also inapposite, because the plaintiff in NCA refused in advance to pay tariffed charges. By contrast, in this action, tariffed charges are not at issue, Cavalier concedes that it must pay Verizon (Opp. at p. 2), and Cavalier contests not the applicable rates but the accuracy of Verizon's bills (Declaration of Catherine T. Webster, Exhibit "1" to Opp., at ¶ 3).[5]

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[4] It is Verizon who has engaged in "self-help," by declaring unilaterally what charges Cavalier may or may not dispute, and by threatening drastic actions that would violate its interconnection agreement with Cavalier.

[5] In another case cited by Verizon, the district court held that AT&T was not entitled to payment of all of its bills, when the plaintiff disputed the adequacy of service. AT&T Co. v. People's Network, Inc., 1993

The public interest weighs in favor of granting the injunction.

Verizon's argument about the alleged impact on the public interest reduces to one point: Verizon opposes a purported "change" in the terms of its interconnection agreement with Cavalier. Verizon first argues the point in terms of the agreement's approval by the State Corporation Commission ("SCC") (see Opp. at pp. 15-16), and next in terms of other parties' agreements with Verizon, which, like Cavalier's agreement, incorporate by reference the terms of an agreement between Verizon's predecessor and MCIMetro. (Opp. at pp. 16-17).

Verizon's argument founders for two reasons. First, Cavalier does not seek to change the terms of the interconnection agreement, but merely to avoid Verizon's violation of the agreement.[6] Second, the SCC routinely approves amendments to interconnection agreements, and other parties are free to "pick and choose" any terms of a new agreement or amendment between Verizon and another competitor. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 834 (1999). The law thus already protects against the public impact imagined by Verizon.

More importantly, Cavalier seeks to survive as a competitor. Competition in the markets for basic telecommunications services is a goal expressly promoted by both the Virginia General Assembly and the U.S. Congress (see November 13, 2001 Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, at pp. 11-12). Verizon has suddenly and preemptively sought to drive

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U.S.Dist. LEXIS 21248 (D.N.J. Mar. 31, 1993), cited in Opp. at pp. 12-13. As noted above, Cavalier has not engaged in this type of "self-help" against tariffed charges.

[6] Verizon asserts, in a footnote, that Cavalier seeks "mandatory" injunctive relief by forcing Verizon to provide "free service" (Opp. at p. 9 n. 7.) However, as noted immediately above, Cavalier's motion is really for "prohibitory" relief, to avoid Verizon's violation of a contract. Verizon's argument on this point should thus be rejected.

Cavalier out of business, directly contravening such a goal.[7] Further, while Verizon half-heartedly disavows any intention of immediately terminating all loop provisioning for Cavalier, Verizon has carefully reserved its right to take exactly that action, which would plunge some 100,000 Virginia telephone users into a chaos of service disruption and service termination. As a matter of public policy, such a result should not be allowed.

Cavalier will post a bond sufficient to protect Verizon's interests.

Verizon requests a bond in the amount of the total amounts that Verizon has billed Cavalier to date. Such a standard is inappropriate and unsupported by any legal argument on Verizon's part. Cavalier suggests a different approach, which is within the Court's discretion under Fed.R.Civ.P. 65(c).

Under Fourth Circuit case law, that amount depends on the harm that might flow to Verizon if injunctive relief were improvidently granted. As explained by one district court:

> [T]he Fourth Circuit has held that the district court is vested with wide discretion in determining the amount of an injunction bond and should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjooined party for harm it suffers as a result of an improvidently issued injunction or restraining order.

Arkansas Best Corp. v. Carolina Freight Corp., 60 F.Supp.2d 517, 1999 U.S.Dist. LEXIS 20740 at *8 (W.D.N.C. June 24, 1999) (denying stay of injunction based on claim that $100.00 bond was inadequate security for injunction prohibiting use of plaintiff's

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[7] Verizon claims that Cavalier does not argue any antitrust basis for its motion (Opp. at pp. 7-8). However, Cavalier has alleged that Verizon's billing practices are part of Verizon's illegal, anticompetitive conduct in violation of both the federal and state antitrust laws. (See November 1, 2001 Complaint at ¶¶ 137-143.) Verizon's October 15, 2001 letter is merely another example. Further, Verizon has no valid basis for seeking dismissal under Goldwasser v. Ameritech, 222 F.3d 390 (7th Cir. 2000) (see Opp. at p. 8, n. 6). Unlike Cavalier's claims, the plaintiffs' claims in Goldwasser appear to have been based on violations of the Telecommunications Act of 1996, Public Law No. 104-104.

federally registered trademark), citing Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411 (4th Cir. 1999).

As stated by Cavalier (Evans Affidavit at ¶ 36), and confirmed in Verizon's own pleadings (Opp. at p. 1), Cavalier leases about 100,000 "loops" from Verizon in Virginia, and that number is currently growing at about 1,500 new lines per month (Evans Affidavit at ¶ 34). Therefore, at the end of November 2001, Cavalier expects to lease about 106,000 local loops from Verizon in Virginia. Leaving aside non-recurring charges due to Verizon and merger discounts and other adjustments due to Cavalier, and assuming a rough average of about $12.00 per loop in monthly charges, Cavalier would owe Verizon roughly $1.3 million for loops in November 2001. Cavalier believes that it is due credits and/or monetary damages for Verizon's failure to perform its obligations under its interconnection agreement (see id. at ¶¶ 15-25).

Consistent with these facts, Cavalier therefore proposes posting a bond for $650,000, or slightly over half the amount of the monthly charges. Such a bond would adequately guard Verizon against the losses it claims might ensue from an improvidently granted temporary restraining order. See, e.g., Fox v. Varity Corp., 1996 U.S.App. LEXIS 19150 at *7-*8 (6th Cir. July 15, 1996) (citing several cases requiring bonds of approximately 50% of the monthly cost of complying with the injunction).[8]

[8] Cavalier does not in any way contend that its financial condition is analogous with the Fox "plaintiffs' limited financial resources." Rather, Cavalier submits that this Court should make allowance for Verizon's breach of its obligations under the interconnection agreement, just as the courts made allowance for limited resources in Fox and the analogous cases cited therein.

Conclusion

For the reasons stated above, Cavalier respectfully requests that the Court grant its Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

CAVALIER TELEPHONE, LLC

By: ______________________
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2001 I caused a true and correct copy of the above pleading to be served by facsimile transmission and by first class U.S. mail, postage prepaid and properly addressed, to:

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EXHIBIT C21-5

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November 3, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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jmp

CAVALIER TELEPHONE, LLC Plaintiff. v. VERIZON VIRGINIA, INC. Defendant.	Civil Action Number 3:01CV736

ORDER

THIS MATTER comes before the Court on the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. For the reasons discussed in the attached Memorandum Opinion, the motion is DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

21 NOV 2001
DATE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

D. jmp

CAVALIER TELEPHONE, LLC Plaintiff. v. VERIZON VIRGINIA, INC. Defendant.	Civil Action Number 3:01CV736

MEMORANDUM OPINION

This matter comes before the Court on Cavalier Telephone's Motion for a Temporary Restraining Order and Preliminary Injunction. For the reasons discussed below, the motion is denied.

I.

Cavalier Telephone ("Cavalier") competes with Verizon Virginia ("Verizon") in the basic telecommunications services market. Cavalier relies on the use of Verizon's "last mile" facilities or loops in order to compete. These facilities, which connect customers' premises to Verizon's central offices, were built years ago when AT&T was a regulated monopoly. Verizon is required to provide these facilities under the Telecommunications Act of 1996, and its duties to Cavalier under the Act are governed by a 1999 Interconnection Agreement between Verizon and Cavalier.

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On November 1, 2001, Cavalier filed suit against Verizon, seeking injunctive relief and monetary damages for Verizon's allegedly anti-competitive behavior.[1] Cavalier alleges that Verizon has taken various actions to prevent Cavalier from effectively competing in the basic telecommunications services market in the Richmond, Tidewater, and Northern Virginia areas. Such actions allegedly include needlessly requiring a certificate of public convenience and necessity before agreeing to interconnect Cavalier's network with Verizon's network; misrouting Cavalier calls in the Tidewater area; and charging Cavalier $400,000 for "space preparation" in regard to a 10-foot by 10-foot space Cavalier needed in Verizon's central office.[2]

One particular area of concern for Cavalier is Verizon's billing in relation to the "last mile" facilities or loops. Cavalier alleges that these bills reflected wrong rate elements and failed to comply with terms imposed by the Bell Atlantic/GTE Corp. Merger Order.[3] Verizon has also apparently sent Cavalier 50,000 pages of paper bills each month, leaving Cavalier uncertain of how much it actually owes Verizon. The overcharges, Cavalier contends, equaled 300% of the actual charge in some cases.

Problems with the billing have lasted for more than two years, and Cavalier ceased paying the bill sometime around August 2000. Terms of the Interconnection Agreement specify a resolution procedure for billing disputes. Cavalier asserts that it has taken steps to resolve the situation. These

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[1]Cavalier seeks compensatory damages of $135 million and punitive damages of $500. The compensatory damages have been trebled from a starting point of $45 million.

[2]Cavalier alleges that Verizon later reduced the amount to $47,686.20.

[3]The Order required certain discounts for residential loops. These discounts can run as high as 51%. Cavalier alleges that, in one bill, Verizon identified every single customer as a business customer despite the fact that roughly two-thirds of Cavalier's customers are residential customers.

steps included requesting the bills be sent in electronic format and meeting with Verizon to address the problems. Verizon, in a letter dated October 15, 2001, notified Cavalier that it is in default under the parties' Interconnection Agreement and has demanded immediate payment of a little more than $9 million that it claims is not disputed. Cavalier claims the $9 million figure may be incorrect. The letter stated, in part, that failure to pay would lead to: ". . . suspension of service provision and termination of the Interconnection Agreement. Initially, Verizon Virginia will place an embargo on Cavalier accounts and suspend the processing of Cavalier service orders." See Letter from Jeannine T. Kirkman to Martin Clift (October 15, 2001). The letter imposed a November 15, 2001 deadline for payment.

Cavalier then sought a temporary restraining order and preliminary injunction preventing Verizon from carrying out this threat.

II.

Preliminary injunctions represent an extraordinary remedy intended to preserve the status quo. Since the courts act on an incomplete record in granting such relief, the risk of mistake is greater and, consequently, any party seeking such injunctive relief must clearly establish its entitlement to the relief sought. See Yellow Cab Co. of Charlottesville v. Rocha, 2000 U.S. Dist. LEXIS 11597 (W.D. Va. 2000). The Fourth Circuit has held that courts must consider the following four factors in determining whether or not to grant a preliminary injunction:

> (1) The likelihood of irreparable harm to the plaintiff;
> (2) The likelihood of harm to the defendant if the injunction is granted;
> (3) The likelihood the plaintiff will succeed on the merits; and
> (4) the public interest.

See Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189, 196 (4th Cir. 1977). The critical element in this analysis is the balance of hardships between the plaintiff and the defendant. If that balance does not favor the plaintiff, the Fourth Circuit has indicated that courts should only then grant an injunction if the plaintiff has shown a substantial likelihood of success on the merits. See Yellow Cab, 2000 U.S. Dist. LEXIS at *9-*10.

Cavalier argues that allowing Verizon to terminate the "last-mile" facilities or loops would endanger Cavalier's business. Cavalier indicates that it would be unable to add new customers, accommodate customers who are moving, or add lines for its current customers.[4] Essentially, Cavalier contends, Verizon's threatened actions would drive it out of business.

The Fourth Circuit has recognized that a threat to the continued existence of a company extends beyond a simple monetary calculation and is "incalculable." See Federal Leasing, Inc. v. Suburban Trust Co., 650 F.2d 495, 500 (4th Cir. 1981). The "possibility of permanent loss of customers to a competitor or the loss of goodwill" satisfies the irreparable damage prong. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994) (citing Merrill-Lynch, Pearce, Fenner and Smith v. Bradley, 756 F.2d 1048, 1055 (4th Cir. 1985)).

Under the present circumstances, however, the threat to Cavalier's existence is illusory. Cavalier readily admits it has the money to pay its bills and that it is not currently in financial difficulty. As a result of a billing dispute with Verizon, Cavalier has simply opted not to pay, apparently in the hope of gaining some leverage in discussions with Verizon. Therefore, Cavalier's

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[4]Verizon has stated that it does not plan to interrupt the service of Cavalier's current customers; rather it seeks only to prevent Cavalier from expanding services without paying for services that Verizon has already provided.

existence as a company cannot be said to be threatened by the actions of Verizon. If Cavalier's existence is threatened at all, it is as a direct result of its decision not to pay its bill.

A finding of irreparable harm is not generally appropriate when an award of monetary damages will suffice as a remedy. See Hughes Network Sys. v. Interdigital Communications Corp., 17 F.3d 691, 694 (4th Cir. 1994). In the present case, Cavalier made the determination that it would not pay bills that it believed contained errors. It acknowledges that it owes Verizon money. It disputes the precise amount of the bill. The situation is easily remedied by monetary damages. Cavalier could avoid Verizon's threatened embargo of certain services by paying the bill. It could then seek a remedy for the over-billed amount in the proper forum.

Furthermore, if Cavalier received the benefit of the injunctive relief it seeks, Verizon would be placed in a position of effectively having to continue to provide services to Cavalier without compensation -- at least until the two parties can settle the billing dispute. Given that the dispute has apparently lasted for several years, Verizon would certainly be harmed the injunction. In short, the facts of this case simply do not demonstrate that the balance of the harms weighs in Cavalier's favor.

Given that the balance of harms does not favor the plaintiff, Cavalier must demonstrate a substantial likelihood of success on the merits. See Yellow Cab, 2000 U.S. DIST LEXIS at *9-*10. Cavalier simply cannot carry this burden.

Cavalier contends that Verizon has not followed the billing dispute resolution procedures contained in the Interconnection Agreement and, thus, asks the Court to enjoin Verizon from implementing its embargo. It also alleges that Verizon has not applied certain discounts required by the Bell Atlantic/GTE Corp. Merger Order and asserts that the $9 million portion of the unpaid bills that Verizon insists is undisputed does, in fact, contain errors.

Verizon, however, contends that the dispute is very simple: Cavalier owes money and has not paid. The Interconnection Agreement that governs the dispute dictates that suspension or termination of services is an alternative when bills go unpaid in certain circumstances. See Interconnection Agreement, § 21.1. In fact, the Interconnection Agreement outlines an entire billing dispute resolution procedure by which the dispute escalates from one level of management to the next over time increments until the dispute is resolved or 120 days have passed. See Interconnection Agreement, § 21.3.

Cavalier may have raised questions about Verizon's billing procedures, but it has not demonstrated that Verizon's conduct fell outside the boundaries of the Interconnection Agreement. That Agreement allows the suspension or termination of services when a bill remains unpaid. Cavalier has not paid its bills and Verizon has threatened to discontinue certain services until payment is received.

As for any potential violations of the Merger Order, Cavalier's chances of success are very much unclear. It has alleged that certain discounts required under the Merger Order have not been applied to the bills. These allegations, however, do not amount to a showing of a substantial likelihood of success on the merits.

The last prong of the Blackwelder analysis concerns the public interest. Cavalier asserts that the interests of promoting competition in the market for basic telecommunications services weigh in its favor. It argues that allowing Verizon to takes its threatened action would drive Cavalier out of business and further reduce competition. It also argues that Verizon's threatened actions could disrupt the phone service of 100,000 telephone users in Virginia.

Verizon, however, asserts that the public interest lies with denying injunctive relief. Granting Cavalier such relief, it contends, would allow Cavalier to alter the legal rights of the parties under the Interconnection Agreement and use its newfound ability to withhold payment as leverage against Verizon. In fact, that seems to be precisely what Cavalier desires. For the Court to interject itself into a billing dispute governed by an Interconnection Agreement that the State Corporation Commission has approved certainly raises public policy issues at least as severe as those argued by Cavalier. For that reason, it cannot be said that the public interest lies with Cavalier in its pursuit of a temporary restraining order and preliminary injunction.

III.

Cavalier has failed to meet its burden on an portion of the Blackwelder test. It has not shown that the balance of the harms weighs in its favor or that it enjoys a substantial likelihood of success on the merits of its claims. Lastly, public policy supports denying injunctive relief as much as it does issuing a temporary restraining order. For these reasons, the motion is denied.

An appropriate Order shall issue.

James R. Spencer
UNITED STATES DISTRICT JUDGE

21 NOV 2001
DATE

CERTIFICATE OF SERVICE

I certify that true and accurate copies of the foregoing responses were served this 3rd day of November, 2003 to the following persons, by the methods indicated:

by electronic mail and by overnight delivery, to:

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